

ALLAN STEYER (SBN: 100318)
JESSICA GRANNIS (SBN: 240770)
STEYER LOWENTHAL BOODROOKAS
ALVAREZ & SMITH LLP
One California Street, Suite 300
San Francisco, California 94111
Tel: (415) 421-3400
Fax: (415) 421-2234
jgrannis@steyerlaw.com

Attorneys for Defendant Combined Management, Inc.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA - SAN FRANCISCO DIVISION

APPLIED UNDERWRITERS, INC., a
Nebraska Corporation, and APPLIED RISK
SERVICES, INC., a Nebraska Corporation,

Plaintiffs,

vs.

COMBINED MANAGEMENT, INC., a
Maine Corporation, and Does 1 Through 10,
Inclusive,

Defendants.

CASE NO. C-07-5129 - BZ

DEFENDANT COMBINED
MANAGEMENT, INC.'S NOTICE OF
MOTION AND MOTION TO DISMISS
FOR LACK OF PERSONAL
JURISDICTION

[Fed. R. Civ. P. 12(b)(2)]

Date: December 5, 2007
Time: 10:00 a.m.
Dept. Courtroom G

Honorable Bernard Zimmerman
United States Magistrate Judge

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:

2 PLEASE TAKE NOTICE THAT pursuant to Federal Rule of Civil Procedure 12(b)(2),
3 on December 5, 2007, at 10:00 a.m., in Courtroom G of the above-entitled Court, located at 450
4 Golden Gate Avenue, 15th Floor; San Francisco, California, or as soon thereafter as this matter
5 may be heard, defendant Combined Management, Inc. ("CMI"), a Maine corporation, will move
6 the court to dismiss the plaintiffs Applied Underwriters, Inc. and Applied Risk Services, Inc.'s
7 (collectively "Applied") complaint for lack of personal jurisdiction, on the grounds that CMI
8 lacks the minimum contacts with the State of California required for this court to exercise
9 jurisdiction within the bounds of the Fourteenth Amendment to the Constitution of the United
10 States.

11 The motion will be based upon this Notice of Motion and Motion, Memorandum of
12 Points and Authorities, Affidavit of Robert L. Murch filed herewith and other evidence filed in
13 support of the Motion, any reply filed by CMI, all pleadings, files and records in this action, and
14 all other oral and documentary evidence which may be presented prior to or at the hearing on
15 this matter.

16
17 Dated: October 10, 2007

STEYER LOWENTHAL BOODROOKAS
ALVAREZ & SMITH LLP

18
19
20 By: /s/ Jessica Grannis
Allan Steyer
Jessica Grannis
21 Attorneys for Combined Management, Inc.
22
23
24
25
26
27
28

ALLAN STEYER (SBN: 100318)
JESSICA GRANNIS (SBN: 240770)
STEYER LOWENTHAL BOODROOKAS
ALVAREZ & SMITH LLP
One California Street, Third Floor
San Francisco, California 94111
Telephone: (415) 421-3400
Facsimile: (415) 421-2234

Attorneys for Defendant
Combined Management, Inc.

IN THE UNITED STATE DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA - SAN FRANCISCO DIVISION

APPLIED UNDERWRITERS, INC., a
Nebraska Corporation, and APPLIED RISK
SERVICES, INC., a Nebraska Corporation,

Plaintiffs,

vs.

COMBINED MANAGEMENT, INC., a Maine
Corporation, and Does 1 Through 10,
Inclusive,

Defendants.

Case No. C-07-5129-BZ

DEFENDANT COMBINED
MANAGEMENT, INC.'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF ITS
MOTION TO DISMISS FOR LACK OF
PERSONAL JURISDICTION

[Fed. R. Civ. P. 12(b)(2)]

Date: December 5, 2007

Time: 10:00 a.m.

Dept. Courtroom G

Honorable Bernard Zimmerman
United States Magistrate Judge

COMES NOW the Defendant Combined Management, Inc. ("CMI") and submits this memorandum in support of its Motion to Dismiss plaintiffs Applied Underwriters, Inc. and Applied Risk Services, Inc.'s (collectively "Applied") complaint for Lack of Personal Jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2).

I.
FACTUAL BACKGROUND

This case arises over a financial dispute between CMI and its insurer, Applied, related to the premiums owed by CMI for CMI's worker's compensation program. CMI is a human resources company based in Maine. Affidavit of Robert L. Murch ("Murch Aff.") at ¶¶ 2, 12 (Ex. A hereto). CMI serves clients in Maine, and has never conducted any business in the State of California. *Id.* at ¶ 12. CMI has no operations in California, and none of its employees have ever been to California for any business purpose associated with the insurance policies at issue in this lawsuit. *Id.* at ¶¶ 11-12.

In 2002, CMI selected Virginia Surety Company, Inc. ("VSCI") to provide workers compensation coverage for the period of March 29, 2002 to May 2, 2003. Ex. A, Murch Aff. at ¶¶ 4-5. At the time, information supplied to CMI indicated that VSCI was based in Chicago, Illinois. *Id.* at ¶ 5. All of the negotiations with VSCI were conducted by CMI in Maine through telephone conversations and mail. *Id.* At no time did CMI leave the State of Maine to negotiate. *Id.*

There was no indication at the time CMI and VSCI started working together that CMI would be doing business with Applied or any other entity with operations in California. Rather, VSCI unilaterally designated Applied as its agent to serve as broker of CMI's policy. *Id.* at ¶ 6. Applied was licensed to serve as an insurance broker in the State of Maine by the Maine Bureau of Insurance, as was Carl DeBarbrie of Applied. *Id.* CMI negotiated with Applied in Maine via telephone and mail. *Id.* at ¶ 8.

The initial contact between Applied and CMI was a telephone call from Carl DeBarbrie of Applied to CMI. *Id.* at ¶ 7. Up until after the point at which an agreement between Applied

1 and CMI was reached, all substantive contacts between the parties were initiated by Applied.
2 Ex. A, Murch Aff. at ¶ 7. No written contract was ever executed between CMI and Applied.

3 Moreover, as explained in some detail by Applied in response to CMI's motion to
4 dismiss Applied's lawsuit against CMI filed in Nebraska earlier this year, Applied is based not
5 in California, but in Nebraska, and Applied's performance of its side of the agreement between
6 CMI and Applied occurred in Nebraska. *See* Affidavit in Opposition to Defendant's Motion to
7 Dismiss For Lack of Personal Jurisdiction ("Brown Aff.") (Ex. B hereto). Applied caused a
8 proposal for workers' compensation coverage to be issued from its Omaha, Nebraska office to
9 CMI. Ex. B, Brown Aff. at ¶ 4. Applied subsequently issued policies to CMI in Nebraska. *Id.*
10 at ¶ 5. CMI sent premium payments to Applied in Nebraska. *Id.* at ¶ 6. These payments were
11 processed by Applied in Nebraska. *Id.* Customer service questions from CMI and its clients
12 were directed to Applied's office in Nebraska, and responded to by Applied customer service
13 representatives in Nebraska. *Id.* All claims from CMI and/or its clients were submitted to
14 Applied for claim processing in Omaha, Nebraska, and all claims checks were processed,
15 issued, and forwarded from Applied's Nebraska office. *Id.*

16 For reasons unknown to CMI, Applied has sought to litigate its claims against CMI
17 anywhere other than in Maine, the obvious forum for a dispute between a Maine company and its
18 Maine-licensed insurance broker. Applied first sued CMI in Nebraska, but CMI successfully
19 moved to dismiss on the ground that the Nebraska court did not have personal jurisdiction over
20 CMI. Applied has now refiled its action in California, a state that has no discernable interest in a
21 dispute between a Maine company and a Maine-licensed/Nebraska based broker, over an
22 insurance policy issued by an Illinois company. CMI submits that while Applied may sue it in
23 Maine, CMI is not subject to the jurisdiction of the California courts under the Fourteenth
24 Amendment to the United States Constitution.

II.
PROCEDURAL BACKGROUND

On August 17, 2007, Applied filed an action against CMI in the Superior Court of California, County of San Francisco. On October 5, 2007, CMI removed the case to this Court pursuant to 28 U.S.C. §§ 1332 and 1441. The motion now before the court is CMI's first substantive filing in this Court.

III.
ARGUMENT

A. The Due Process Requirement for Personal Jurisdiction

The California "long-arm statute" extends the jurisdiction of California courts to the limits permitted under the *U.S. Constitution*. *Doe v. Unocal Corp.*, 248 F.3d 915, 923 (9th Cir. 2001); Cal. Code Civ. Pro. § 410.10. Thus the question on a motion to dismiss for lack of personal jurisdiction is whether or not the exercise of the court's jurisdiction comports with the requirements of due process. "Constitutional due process concerns are satisfied where a nonresident defendant has certain minimum contacts with the forum such that the maintenance of the suit does not offend traditional conceptions of fair play and substantial justice." *Unocal*, 248 F.3d at 923 (internal quotation marks omitted).

"It is the plaintiff's burden to establish the court's personal jurisdiction over a defendant." *Id.* at 922; *AT&T Co. v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 588 (9th Cir. 1996). In evaluating a motion to dismiss for lack of personal jurisdiction, "uncontroverted allegations in [the] complaint must be taken as true, and conflicts between the facts contained in the parties' affidavits must be resolved in [plaintiff's] favor for purposes of deciding whether a prima facie case for personal jurisdiction exists." *AT&T*, 94 F.3d at 588 (internal quotation marks omitted). The court is not, however, required to credit conclusory allegations made in the complaint. *See Clegg v. Cult Awareness Network*, 18 F.3d 752, 756 (9th Cir. 1994) (affirming district court decision granting motion to dismiss for failure to state a claim because, *inter alia*, "[a]lthough [plaintiff] alleges in conclusory fashion that [defendant organization] is a place of public

1 accommodation, he fails to allege sufficient facts to support that conclusion."); *see also Panda*
2 *Brandywine Corp. v. Potomac Elec. Power Co.*, 253 F.3d 865, 869 (5th Cir. 2001) (courts are
3 not required to "credit conclusory allegations" in ruling on motion to dismiss for lack of
4 personal jurisdiction); *Mass. School of Law v. American Bar Assoc.*, 142 F.3d 26, 34 (1st Cir.
5 1998) (same).

6 There are two ways for a plaintiff to establish jurisdiction over a defendant. If the
7 defendant's contacts with the forum are "continuous and systematic," it may be subject to
8 general jurisdiction in the forum state. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466
9 U.S. 408, 416 (1984). General jurisdiction extends to claims that are unrelated to the
10 defendant's contacts with the forum. *See id.* at 414-16. Nothing in the Complaint even hints
11 that CMI is subject to the general jurisdiction of the California courts.

12 In the absence of continuous and systematic contacts sufficient to establish general
13 jurisdiction, a plaintiff may establish *specific jurisdiction* over a defendant to litigate claims that
14 arise out of the defendant's contacts with the forum. There are three requirements for a showing
15 of specific jurisdiction. *Doe v. American Nat. Red Cross*, 112 F.3d 1048, 1051 (9th Cir. 1997).
16 First, the defendant must "purposefully avail" itself of the privilege of conducting activities in
17 the forum, thereby invoking the benefits and protections of its laws. *Id.* (internal quotation
18 marks omitted). Second, the claim must arise out of or result from the defendant's forum-related
19 activities. *Id.* Third, the exercise of jurisdiction must be reasonable. *Id.* Of decisive
20 importance here is the first requirement for specific jurisdiction, which is that there must be
21 "some act by which the defendant purposefully avails itself of the privilege of conducting
22 activities within the forum State." *Omeluk v. Langsten Slip & Batbyggeri A/S*, 52 F.3d 267, 270
23 (9th Cir. 1995) (*quoting Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-75 (1985)). CMI
24 submits that Applied cannot establish the first requirement for personal jurisdiction, because
25 CMI never purposefully availed itself of the privilege of doing business in California.

B. The Purposeful Availment Requirement Is Not Met

The jurisdictional allegations against CMI in the Complaint are highly conclusory. According to the Complaint, CMI "did business with Applied in San Francisco, California," and "the contract at issue was entered into, and performed, in San Francisco, California." Complaint ¶¶ 2-3. CMI submits that these conclusory allegations are insufficient to meet Applied's burden to establish personal jurisdiction over CMI. *Clegg*, 18 F.3d at 756; *Panda*, 253 F.3d at 869. The reason the jurisdictional allegations in the Complaint are so sparse is straightforward: CMI has done nothing to purposefully avail itself of the privilege of doing business in California. Applied points to an agreement between itself and CMI that was negotiated between CMI in Maine and Applied personnel in San Francisco. But "the existence of a contract with a resident of the forum state is insufficient by itself to create personal jurisdiction over the nonresident." *Roth v. Garcia Marquez*, 942 F.2d 617, 621 (9th Cir. 1991)(citing *Burger King v. Rudzewicz*, 471 U.S. 462, 478 (1985)). Thus, "[w]hen a California business seeks out purchasers in other states . . . [and] deals with them by out-of-state agents or by interstate mail and telephone, it is not entitled to force the customer to come to California to defend an action on the contract." *Roth*, 942 F.2d at 621-22 (internal quotation marks omitted). "[B]oth this court [the Ninth Circuit] and the courts of California have concluded that ordinarily 'use of the mails, telephone, or other international communications simply do not qualify as purposeful activity invoking the benefits and protection of the [forum] state.'" *Id.* at 622 (quoting *Peterson v. Kennedy*, 771 F.2d 1244, 1262 (9th Cir. 1985)).

Here, CMI negotiated with Applied in Maine; its contacts with Applied personnel who happened to be located in California were limited to telephone and mail. Ex. A, Murch Aff. at ¶¶ 8, 11-12. Moreover, up until after the point at which an agreement between Applied and CMI was reached, all substantive contacts between the parties were *initiated by Applied*, which "sought out" CMI in Maine. *Id.* at ¶ 7. Under *Roth*, this is simply not sufficient to meet the purposeful availment requirement for personal jurisdiction. 942 F.2d at 621-22.

1 CMI never engaged a California entity to provide its insurance; it contacted VSCI, based
 2 in Chicago. On its own initiative, and without consulting CMI, VSCI retained Applied to serve
 3 as broker on the account. Ex. A, Murch Aff. at ¶ 6. Applied listed a California address on some
 4 of its correspondence, but was licensed to serve as an insurance broker in Maine, and CMI
 5 negotiated with Applied in Maine. *Id.* at ¶¶ 6, 8. By definition, the decision of VSCI to use
 6 Applied as a broker was not a "purposeful" action on the part of CMI. Wherever Applied may
 7 have elected to conduct its affairs, CMI itself directed no purposeful activity at California. *See*
 8 *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 816-817 (9th Cir. 1988))("[A] plaintiff's
 9 performance in California cannot give jurisdiction over . . . a nonresident defendant; it is a
 10 defendant's activity that must provide the basis for jurisdiction.") (emphasis added) (brackets
 11 and internal quotation marks omitted).

12 If the mechanics of contract formation do not support a conclusion that the defendant
 13 purposefully availed itself of the benefits of doing business in the forum, the purposeful
 14 availment requirement may nevertheless be met if the defendant "entered into a relationship that
 15 'envisioned continuing and wide-reaching contacts with [the plaintiff] in [the forum state].'" *Roth*,
 16 942 F.2d at 622 (*quoting Burger King*, 471 U.S. at 480). In *Roth*, purposeful availment
 17 was found where "the contract concerned a film, most of the work for which would have been
 18 performed in California," including "all of the editing, production work, and advertising . . ."
 19 *Id.* at 622. The Court explained: "This is not an instance where the contract was a one-shot deal
 20 that was merely negotiated and signed by one party in the forum; on the contrary, most of the
 21 future of the contract would have centered on the forum." *Id.*

22 Here, in clear contrast to the situation in *Roth*, the agreement between CMI and Applied
 23 was a "one-shot deal," for one year (March 29, 2002 to May 2, 2003). Ex. A, Murch Aff. at ¶ 5.
 24 No ongoing relationship beyond the one-year policy period was created. Indeed, no written
 25 contract was ever executed by the parties, even for the one-year policy period. In further
 26 contrast to *Roth*, the "future of the contract" was not "centered on" California. VSCI (based in
 27 Illinois) provided insurance to CMI in Maine. *Id.* at ¶¶ 4-5. The policy was issued by Applied,
 28

1 acting as broker, in Omaha, Nebraska. Ex. B, Brown Aff. at ¶ 5. CMI sent premium payments
 2 to Applied in Omaha, Nebraska. *Id.* at ¶ 6. These payments were processed by Applied in
 3 Nebraska. *Id.* Customer service questions from CMI and its clients were directed to Applied's
 4 office in Nebraska, and responded to by Applied customer service representatives in Nebraska.
 5 Ex. B, Brown Aff. at ¶ 6. All claims from CMI and/or its clients were submitted to Applied for
 6 processing in Nebraska, and all claims checks were processed, issued, and forwarded from
 7 Applied's Nebraska office. *Id.* In sum, the relationship was centered in Maine, with some ties
 8 to Nebraska; it has next to nothing to do with California.

9 C. The Reasonableness Requirement Is Not Met

10 Even if the Court were somehow to conclude that CMI had purposefully availed itself of
 11 the benefits of doing business in California, personal jurisdiction over CMI would still be
 12 lacking under the "reasonableness" requirement, the third prong of the due process analysis.
 13 *American Nat. Red Cross*, 112 F.3d at 1051. "In determining whether the exercise of
 14 jurisdiction comports with 'fair play and substantial justice,' and is therefore 'reasonable,'" this
 15 Court must consider seven factors: "(1) the extent of the defendant's purposeful injection into
 16 the forum state's affairs; (2) the burden on the defendant of defending in the forum; (3) the
 17 extent of conflict with the sovereignty of the defendant's state; (4) the forum state's interest in
 18 adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the
 19 importance of the forum to the plaintiff's interest in convenient and effective relief; and (7) the
 20 existence of an alternative forum." *Dole Food Co., Inc. v. Watts*, 303 F.3d 1104, 1114 (9th Cir.
 21 2002). The first factor has been discussed *supra*.

22 The second factor – the burden on CMI of defending in the forum – weighs against a
 23 finding that jurisdiction would be reasonable, as CMI is a Maine company that has had only the
 24 tangential contacts with California described above, and would be burdened if forced to defend
 25 this lawsuit thousands of miles from its home. The third and fourth factors – extent of conflict
 26 with the sovereignty of Maine, and Maine's interest in adjudicating the dispute – also weigh
 27 against jurisdiction in California, as Maine has a far more substantial interest than does
 28

1 California in a contractual relationship between a Maine company and a Nebraska-based entity
2 that is licensed to serve as an insurance broker in Maine. The sixth and seventh factors also
3 weigh against jurisdiction, as Applied, being licensed to serve as an insurance broker in Maine,
4 is presumably ready and able to litigate if necessary in Maine – the obvious alternative forum for
5 the adjudication of this dispute. *See Dole*, 303 F.3d at 1114.

6 In sum, because the Ninth Circuit's seven-factor reasonableness test weighs against
7 finding that this Court's exercise of jurisdiction over CMI would be reasonable and consistent
8 with fair play and substantial justice, CMI's motion to dismiss should be granted.

9
10 IV.
CONCLUSION

11 For the foregoing reasons, CMI's Motion to Dismiss for Lack of Personal Jurisdiction
12 should be granted.

13 Dated: October 10, 2007

STEYER LOWENTHAL BOODROOKAS
ALVAREZ & SMITH LLP

14
15
16 By: /s/ Jessica Grannis
Allan Steyer
17 Jessica Grannis
18 Attorneys for Combined Management, Inc.
19
20
21
22
23
24
25
26
27
28